PUBLICATION UPDATE

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California Torts

Publication 116 Release 46 May 2009

HIGHLIGHTS

Statutory Revisions and New Cases

- Throughout the set, statutory revisions, and new decisions from the California Supreme Court and courts of appeal have been incorporated into the text.

Statutory Updates

Immunity for Training of Emergency Services Personnel Volunteered During Emergencies. Under new Health & Safety Code § 1799.100, the Legislature has provided civil immunity from liability for improper training for local agencies, state or local government entities, and private businesses or nonprofit organizations included on the statewide emergency services registry established under Gov. Code § 8588.2 that voluntarily and without expectation and receipt of compensation donate services, goods, labor, equipment, resources, or dispensaries or other facilities in compliance with Gov. Code § 8588.2. See Ch. 20, *Motor Vehicles,* § 20.55[5].

Electronic Texting While Driving Prohibited. Under new Veh. Code § 23123.5, with specified exceptions, all persons are prohibited from driving while using an electronic wireless communications device to manually write, send, or read a text-based communication, which includes but is not limited to a text message, instant message, or e-mail. See Ch. 20, *Motor Vehicles,* § 20.65[2][c].

Immunity for Dentist Providing Voluntary Emergency Services. Under amended Bus. & Prof. Code § 1627.5, a licensed dentist who voluntarily and without compensation provides emergency medical care to a person during a state of emergency is not liable for any personal injury, wrongful death, or property damage caused by the dentist's negligent act or omission taken in good faith. See Ch. 31, *Liability of Physicians and Other Medical Practitioners,* § 31.62.

Los Angeles County Flood Control Agency Immunity Amended. Under amended Gov. Code § 831.8, Los Angeles County flood control agencies and water conservation facilities and their employees are immune from liability for injury to children 16 years old or younger caused by the condition or use of unlined flood con-

trol channels or adjacent groundwater recharge spreading grounds if, at the time of injury, the person injured was using the property for any purpose other than that for which the public entity intended it to be used. See Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees,* § 61.03[10][b].

Plaintiff in Child Sex Abuse Case Not Required to Comply With Government Claims Act. Under amended Gov. Code § 905, a plaintiff seeking to file suit for damages for childhood sexual abuse pursuant to Code Civ. Proc. § 340.1 against a local public entity arising from conduct occurring on or after January 1, 2009, is not required to first file a claim with the local public entity within six months after accrual of the claim, as would generally be the case under the Government Claims Act. See Ch. 62, *Claims and Actions Against Public Entities and Employees,* § 62.04[1], and Ch. 71, *Commencement, Prosecution, and Dismissal of Tort Actions,* § 71.02[3][j].

New Provisions for Discovery Required for Out-of-State Lawsuits Added. Effective January 1, 2010, the Interstate and International Depositions and Discovery Act, beginning at Code Civ. Proc. § 2029.100, governs depositions in California required for out-of-state lawsuits. See Ch. 72, *Discovery,* § 72.41[1][a].

Indemnity Rules for Residential Construction Contracts Amended. Under amended Civ. Code § 2782, the indemnity rules for residential construction contracts provided by that statute have been expanded to apply to agreements that purport to insure or indemnify the builder or a general contractor or other contractor not affiliated with the builder, and provide that a subcontractor owes no defense or indemnity for a construction defect claim unless and until the builder or contractor provides a written tender of the claim to the subcontractor, which has the same force and effect as a notice of commencement of a legal proceeding. The statute also now provides for subcontractor options upon tender of a written claim, and specifies consequences for a failure to meet defense obligations. See Ch. 74, *Resolving Multiparty Tort Litigation,* § 74.43[2].

Case Law Updates

Banks Owed No Duty to Identity Theft Victim. In *Rodriguez v. Bank of the West* (2008) 16 Cal. App. 4th 454, the court of appeal held that, in an identity theft case, plaintiff was not a customer of defendant banks, even though accounts were opened with the banks in his name by plaintiff's office manager, but without plaintiff's consent or knowledge. As plaintiff was not a customer, and alleged no facts to suggest that the office manager acted in a manner that should have aroused the banks' suspicions, the court held that the banks owed no duty to plaintiff. See Ch. 1, *Negligence: Duty and Breach,* § 1.04[2].

Homeowners Not Liable for Electrocuted Tree Trimmer. In *Ramirez v. Nelson* (2008) 44 Cal. 4th 908, the California Supreme Court concluded that Pen. Code § 385(b), which makes it a misdemeanor for any person or employee of any person to operate or place any equipment within six feet of a high voltage overhead conductor, was not intended to protect against injury to the equipment operator himself, and thus defendant homeowners, even if considered employers, could not be held liable under the negligence per se doctrine for an injury to a tree-trimming contractor's employee who accidentally electrocuted himself by bringing his polesaw into contact with overhead power lines. See Ch. 3, *Proof of Negligence,* § 3.10[2][d].

Primary Assumption of Risk Not Defense When Plaintiff Boat Passenger Injured When Jumping Off of Boat. In *Kindrich v. Long Beach Yacht Club* (2008) 167 Cal. App. 4th 1252, the court of appeal held that primary assumption of risk was not a defense in an action brought against a yacht club by a passenger on a boat who broke his leg when he jumped off of the boat in an attempt to help in tying off the boat as it was returning to the dock. The court concluded that plaintiff passenger was not engaged in an active sport and any comparison of the negligence of the respective parties was a question of fact still to be resolved. See Ch. 4, *Comparative Negligence, Assumption of the Risk, and Related Defenses,* § 4.03[2][b][v].

Employer Not Vicariously Liable for Accident Caused by Employee. In *Miller v. American Greetings Corp.* (2008) 161 Cal. App. 4th 1055, the court of appeal held that an employer was not vicariously liable when an employee accidentally hit plaintiff with his car approximately eight minutes after engaging in a brief work-related cell phone call from his vehicle while on his way to see an attorney for personal reasons. See Ch. 8, *Vicarious Liability,* § 8.03[3][c].

Employee's Right to Indemnity Under Lab. Code § 2802 is Nonwaivable. In *Edwards v. Arthur Andersen LLP* (2008) 44 Cal. 4th 937, the California Supreme Court held that an employee's right to indemnity from an employer provided by Lab. Code § 2802 is nonwaivable and any contract that purports to waive this right is unlawful to that extent. The Court also held that a contract provision releasing "any and all" claims generally does not encompass the nonwaivable statutory protections afforded by Lab. Code § 2802 and does not implicitly apply to an employee's right to indemnification from an employer. See Ch. 8, *Vicarious Liability,* § 8.03[4][b].

Public Entity Can Be Liable Under Gov. Code § 815.4 for Injury to Employee of Independent Contractor. In *McCarty v. Department of Transportation* (2008) 164 Cal. App. 4th 955, the court of appeal held that Gov. Code § 815.4 can provide a statutory basis for imposing liability on a public entity hirer of an independent contractor based on retention of control over safety at the worksite when negligent exercise of that retained control affirmatively contributes to an injury to an employee of the independent contractor. See Ch. 8, *Vicarious Liability,* § 8.05[3][b][ii].

Use of Safety Regulations Limited in Actions Brought by Subcontractor's Employee Against General Contractor. In *Padilla v. Pomona College* (2008) 166 Cal. App. 4th 661, the court of appeal held that safety regulations are only admissible in actions by employees of subcontractors brought against a general contractor if the evidence establishes that the general contractor affirmatively contributed to the employee's injuries. The court also held that the Cal-OSHA regulation found at 8 Cal. Code Regs. § 1735(a) did not impose a nondelegable duty on any particular party. See Ch. 8, *Vicarious Liability,* § 8.05[3][b][ii], [d].

Homeowner Owed Duty of Care to Protect Construction Worker From Attack by Pit Bulls Owned by Gardener. In *Salinas v. Martin* (2008) 166 Cal. App. 4th 404, the court of appeal held that a homeowner who was having remodeling work done on his home was held to have a duty of care to protect a construction worker from attack by pit bulls owned by a gardener also working at the house at the same time. While the homeowner was not at home at the time of the attack, he had specifically given the gardener permission to let the dogs roam free in his backyard

and had also given permission to plaintiff to retrieve boards that he had stored in that yard. See Ch. 15, *General Premises Liability,* § 15.04[5].

Landowner Owed No Duty to Post Warning Sign at Intersection of Private Farm Road and Public Road. In *Garcia v. Paramount Citrus Assn., Inc.* (2008) 164 Cal. App. 4th 1448, the court of appeal held that the owner of agricultural land used for orchards owed no duty to post a warning sign at the spot that a private farm road intersected a public road just because an unauthorized driver who was using the farm road failed to recognize the transition to the public road, drove from the farm road to the public road at an excessive rate of speed, and caused a collision with another vehicle on the public road. See Ch. 15, *General Premises Liability,* § 15.06[3].

Continuing Nuisance Damages Denied for Contamination That Impaired Ability to Refinance. In *Gehr v. Baker Hughes Oil Field Operations, Inc.* (2008) 165 Cal. App. 4th 660, the court of appeal held that a plaintiff who was unable to obtain refinancing on real property due to soil contamination caused by the previous owner could not recover damages for a continuing nuisance based on the difference in interest paid under the original loan and what would have been paid had plaintiff been able to obtain refinancing at a lower rate. See Ch. 17, *Nuisance and Trespass,* § 17.10[2][a].

Unknowing Community Property Interest in Vehicle Insufficient to Confer Owner Status Under Civ. Code § 3333.4. In *Ieremia v. Hilmar Unified School Dist.* (2008) 166 Cal. App. 4th 324, the court of appeal held that despite the fact that a vehicle was purchased with community funds, a spouse's unknowing community property interest was not sufficient to find her an owner of the vehicle for purposes of Civ. Code § 3333.4. See Ch. 20, *Motor Vehicles,* § 20.06.

Remounting of Tire on Same Vehicle Does Not Implicate Prohibition Against Mounting Tires With Inadequate Tread. In *Alcala v. Vazmar Corp.* (2008) 167 Cal. App. 4th 747, the court of appeal held that Veh. Code § 27465, which prohibits dealers and persons holding a retail seller's permit from selling, offering for sale, exposing for sale, or installing on a vehicle axle for use on a highway any pneumatic tire having less than a specified amount of tread depth, does not apply when a tire already mounted on a vehicle is removed and remounted on that same vehicle by a dealer or retail seller. See Ch. 20, *Motor Vehicles,* § 20.81[5][b][i].

Action Against Minivan Manufacturer for Inadequate Seatbelt Protection Preempted by Federal Law. In *Williamson v. Mazda Motor of America, Inc.* (2008) 167 Cal. App. 4th 905, the court of appeal held that plaintiffs' state-law action seeking to hold a minivan manufacturer liable for providing only lap-belt restraint in the interior seat of the middle row of seats in a minivan, rather than providing lap- and shoulder-belt restraint, was preempted by a federal regulation promulgated under the National Traffic and Motor Vehicle Safety Act of 1966. See Ch. 20, *Motor Vehicles,* § 20.81[5][e].

Negligence Action Against Commuter Railroad Preempted by Federal Law. In *Southern California Regional Rail Authority v. Superior Court* (2008) 163 Cal. App. 4th 712, the court of appeal held that a negligence claim brought against a commuter railroad for an accident that occurred when defendant ran a train in push mode with a cab car in the lead position was preempted by federal law, because federal

regulations addressed safety concerns over the use of cab cars in the lead position. See Ch. 23, *Carriers,* § 23.20.

MICRA Statute of Limitations Inapplicable to Intentional Torts. In *Unruh-Haxton v. Regents of University of California* (2008) 162 Cal. App. 4th 343, the court of appeal held that the statute of limitations provided in Code Civ. Proc. § 340.5, enacted as part of MICRA, did not apply to plaintiffs' causes of action for the intentional torts of fraud, intentional infliction of emotional distress, and conversion, based on allegations that doctors in a fertility clinic stole human genetic materials from plaintiffs, such as eggs that had been frozen for future use, and sold the materials without authorization. See Ch. 31, *Liability of Physicians and Other Medical Practitioners,* § 31.10.

Undertaking Pending Appeal Calculated Using Present Value of Entire Judgment, Not Using Periodic Payment Schedule. In *Leung v. Verdugo Hills Hospital* (2008) 168 Cal. App. 4th 205, the court of appeal held that if a medical malpractice defendant against whom a judgment has been rendered must post an undertaking to stay the judgment pending appeal under Code Civ. Proc. § 917.1, the amount of the undertaking is calculated under that statute using the lump sum present value of the entire judgment, not using some lesser amount based on the payments that might otherwise actually be payable during the appeal under a periodic payment schedule created under Code Civ. Proc. § 667.7. See Ch. 31, *Liability of Physicians and Other Medical Practitioners,* § 31.50[2][c].

All Elements Under Elder Abuse Statute Must be Proven by Clear and Convincing Evidence. In *Perlin v. Fountain View Management, Inc.* (2008) 163 Cal. App. 4th 657, the court of appeal held that because liability for the requisite abuse or neglect under the elder abuse statute must be shown by clear and convincing evidence, rather than the preponderance of the evidence standard generally applicable in civil cases, all elements of the abuse or neglect, including causation, are subject to that heightened burden of proof in order to establish eligibility for the heightened remedies available under the statute. See Ch. 31, *Liability of Physicians and Other Medical Practitioners,* § 31.50[4][d].

Code Civ. Proc. § 425.13 Applicable to Elder Abuse Actions Against Religious Corporations. In *Little Co. of Mary Hospital v. Superior Court* (2008) 162 Cal. App. 4th 261, the court of appeal held that although the procedural requirements of Code Civ. Proc. § 425.13 do not apply to an action brought under the Elder Abuse Act, the similar procedural requirements of Code Civ. Proc. § 425.14 applicable when a plaintiff seeks to recover punitive damages from a religious corporation do apply to a cause of action brought under the Elder Abuse Act. See Ch. 31, *Liability of Physicians and Other Medical Practitioners,* § 31.50[4][d].

Factual Innocence Requirement in Criminal Defense Malpractice Cases Extends to All Transactionally Related Offenses. In *Wilkinson v. Zelen* (2008) 167 Cal. App. 4th 37, the court of appeal held that the requirement of factual innocence and exoneration applicable when suing a criminal defense attorney for malpractice applies to transactionally related offenses stemming from the same criminal event that do not necessarily qualify as lesser-included offenses. See Ch. 32, *Liability of Attorneys,* §§ 32.02[5][a], 32.30.

Separate Limitations Period Runs Against Third Party Who Obtains Mis-

appropriated Trade Secret From Original Misappropriator. In *Cypress Semiconductor Corp. v. Superior Court* (2008) 163 Cal. App. 4th 575, the court of appeal held that if a third party subsequently obtains misappropriated trade secrets from the original misappropriating party, a plaintiff's claim against that third party accrues only when the plaintiff discovers that third party's misappropriation; as to that third party, consistent with the single-claim rule, any continuing misappropriation constitutes a single claim. See Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.55[1][b].

Motion to Strike Brought Two Years After Complaint was Not Timely. In *Platypus Wear, Inc. v. Goldberg* (2008) 166 Cal. App. 4th 772, the court of appeal held that a motion to strike brought under the anti-SLAPP statute filed two years after the complaint was filed was untimely, because the defendant failed to articulate any extenuating circumstances justifying the late filing and substantial discovery had already taken place when the motion to strike was brought. See Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.106[3][b][i].

Amendment to Complaint Barred After Motion to Strike Filed. In *Salma v. Capon* (2008) 161 Cal. App. 4th 1275, the court of appeal held that, in order to promote the early evaluation and resolution of claims arising from protected activity envisioned by the anti-SLAPP statute, a complaint may not be amended after a motion to strike has been filed. See Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.106[3][b][i].

Consumer of Wheel and Tire Service Contract Lacked Standing to Bring Unfair Competition Action Against Unlicensed Seller. In *Medina v. Safe-Guard Products, Internat., Inc.* (2008) 164 Cal. App. 4th 105, the court of appeal held that although the seller of a wheel and tire service coverage contract purchased with a new automobile was unlicensed as an insurer in California, a consumer suffered no injury caused by this unlicensed status sufficient to establish standing to bring an unfair competition action. See Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.150[4][a].

Collateral Estoppel Did Not Bar Class Certification in Unfair Competition Action. In *Johnson v. GlaxoSmithKline, Inc.* (2008) 166 Cal. App. 4th 1497, the court of appeal held that collateral estoppel did not bar an unfair competition action seeking class certification under California law just because a court in a previous action alleging the same actionable conduct denied class certification, as the class certification in the previous action was denied because the proposed class included all plaintiffs eligible to bring suit under the more liberal pre-Proposition 64 standing requirements and class certification in the subsequent action was limited to only those plaintiffs who could meet the more stringent standing requirements imposed by Proposition 64. See Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.150[4][a].

Unpaid Wages Not Generally Recoverable Under Unfair Competition Statute From Owners, Officers, or Managers of Employer. In *Bradstreet v. Wong* (2008) 161 Cal. App. 4th 1440, the court of appeal held that while unpaid wages may be recovered from an employer under the unfair competition statute, Bus. & Prof. Code § 17200 et seq., wages may not be recovered as restitution from the employer's owners, officers, or managers, unless the labor was performed for such persons personally or those persons appropriated funds from the employer that would otherwise

have been used to pay the unpaid wages. See Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.150[5][a].

Narrow-Restraint Exception to Bus. & Prof. Code § 16600 Rejected. In *Edwards v. Arthur Andersen LLP* (2008) 44 Cal. 4th 937, the California Supreme Court rejected a "narrow-restraint" exception to Bus. & Prof. Code § 16600, finding that statute to be unambiguous in invalidating all restraints of trade that do not fall under a specific statutory exception. See Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.160[3].

Supervisory Employee Not Personally Liable for Wrongful Termination in Violation of Public Policy; Public Employer Not Liable for Tort. In *Miklosy v. Regents of University of California* (2008) 44 Cal. 4th 876, the California Supreme Court held that because a common-law action for wrongful discharge in violation of public policy is premised on the termination of an employment relationship that existed between the parties, although a supervisory employee may be the instrument for effecting the discharge, only the actual employer may be held liable under the cause of action. The Court also held that there is no statutory basis for holding a public employer liable for wrongful discharge in violation of public policy. See Ch. 40A, *Wrongful Termination,* §§ 40A.12[1][b], 40A.30[14].

Retaliation Suit Against University of California Barred Unless University Fails to Issue Timely Decision on Administrative Complaint. In *Miklosy v. Regents of University of California* (2008) 44 Cal. 4th 876, the California Supreme Court also held that if a retaliation suit is brought against the University of California, an action for damages is not available unless the injured employee has first filed a complaint with the designated university officer and the university fails to reach a decision on that complaint within the applicable time limits established by the Regents. Thus, if the university issues a timely decision on a complaint, no action for damages is available regardless of whether the university's decision is adverse to the complainant. See Ch. 40A, *Wrongful Termination,* § 40A.30[13].

Limitations Period on FEHA Action May be Equitably Tolled While Internal Administrative Procedures are Pursued. In *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal. 4th 88, the California Supreme Court held that if a party initiates an administrative process, even a voluntary one, to resolve a dispute alleging a violation of the Fair Employment and Housing Act, and takes it to a decision that is of a sufficiently judicial character to support collateral estoppel, the prospective plaintiff must continue that process to completion, including exhausting any available judicial avenues for reversal of adverse findings, before pursuing statutory remedies and failure to do so will result in any quasi-judicial administrative findings achieving binding, preclusive effect. The Court also held that the limitations period applicable to a statutory claim brought under the FEHA may be equitable tolled while the employer and employee pursue resolution of a grievance through an internal administrative procedure, even if participation in that procedure is voluntary. See Ch. 40A, *Wrongful Termination,* § 40A.30[13], and Ch. 40B, *Employment Discrimination and Harassment,* § 40B.50[1][a].

Action Against Police for Unreasonable Use of Deadly Force Not Barred by Conviction for Resisting Police in Performance of Duties. In *Yount v. City of Sacramento* (2008) 43 Cal. 4th 885, the

California Supreme Court held that although an admission by a convicted criminal defendant that he or she resisted officers in the performance of their duties, and that those officers had the right to respond with reasonable force, may bar a civil action based on the use of reasonable force, an action for battery alleging the *unreasonable* use of deadly force is not barred if that civil action would not call into question the validity of the arrest and conviction. See Ch. 41, *Assault and Battery,* § 41.24[1].

Fraud Exception to Interim Adverse Judgment Rule Cannot Be Relitigated in Malicious Prosecution Action. In *Plumley v. Mockett* (2008) 164 Cal. App. 4th 1031, the court of appeal held that, although there is a fraud exception to the general rule that a trial court judgment in the underlying action in favor of the malicious prosecution defendant will establish probable cause for bringing the action even if that decision is subsequently reversed on appeal, if the claims of fraud or perjury are litigated and rejected by the fact finder in the underlying action, a malicious prosecution plaintiff cannot rely on those same claims of fraud or perjury to establish the absence of probable cause in the malicious prosecution action. See Ch. 43, *Malicious Prosecution and Abuse of Process,* § 43.05[2][b][iv].

No Third-Party Publication Found When Defamatory Material Faxed to Number Provided by Plaintiff. In *Martinelli v. International House USA* (2008) 161 Cal. App. 4th 1332, the court of appeal held that allegedly-defamatory allegations contained in a letter to plaintiff faxed to a number provided by plaintiff did not constitute publication to a third party, even though plaintiff's daughter read the fax after it came out of the machine. See Ch. 45, *Defamation,* § 45.04[1].

Ministerial Exception Applied to Post-Termination Statements Made to Congregation. In *Gunn v. Mariners Church, Inc.* (2008) 167 Cal. App. 4th 206, the court of appeal held that because evaluating the truth or falsity of those statements would necessarily require an inquiry into the truth or falsity of the doctrinal beliefs of the church, a gay worship director could not sue his former church employer for post-termination statements to the congregation suggesting that plaintiff had been "caught in a sin," had admitted to "moral and sexual actions that are sin," had suffered a "breakdown in character," and was a "broken man." See Ch. 45, *Defamation,* § 45.05[2].

Media Defendant Not Liable for Publishing One-Sided Report; Discovery Requirements Under Anti-SLAPP Statute Clarified. In *Paterno v. Superior Court* (2008) 163 Cal. App. 4th 1342, the court of appeal held that a media defendant is not liable in defamation for publishing a factual account that provides only one perspective on a story, but fails to include additional facts that might give the reader or listener a different impression of the events discussed. The court also held that a plaintiff opposing a motion to strike under Code Civ. Proc. § 425.16 who must demonstrate actual malice to prevail on a defamation claim does not have good cause to seek discovery on the issue of malice without first making a prima facie demonstration that the allegedly defamatory statements are provably false factual assertions. See Ch. 45, *Defamation,* §§ 45.05[2], 45.26.

Preliminary Injunction In Defamation Suit was Unconstitutional. In *Evans v. Evans* (2008) 162 Cal. App. 4th 1157, the court of appeal held that a pretrial order preventing the defendant from publishing false and defamatory statements about plaintiff, her ex-husband, on the Internet was constitutionally invalid, as no statements by defendant had yet been found

through a trial to be defamatory, and was unconstitutionally vague and overbroad, as it failed to adequately describe which of defendant's future comments might violate the injunction. See Ch. 45, *Defamation,* § 45.23[1].

Defendant Entitled to Costs if Plaintiff Dismisses Suit as Part of Settlement. In *Chinn v. KMR Property Management* (2008) 166 Cal. App. 4th 175, the court of appeal held that if a plaintiff accepts payment in settlement in exchange for agreeing to dismiss an action, the defendant is considered the prevailing party as a defendant in whose favor a dismissal is entered for purposes of recovering costs under Code Civ. Proc. § 1032(a). See Ch. 50, *Damages, Costs, Attorneys' Fees, and Interest,* § 50.10[2].

Defendant Not Vexatious Litigant. In *Mahdavi v. Superior Court* (2008) 166 Cal. App. 4th 32, the court of appeal held that because the vexatious litigant statute applies to *plaintiffs* who file new litigation, it cannot be used to require a *defendant* who has previously been declared a vexatious litigant in other litigation to obtain leave of the presiding judge before filing an appeal in the current litigation. See Ch. 50, *Damages, Costs, Attorneys' Fees, and Interest,* § 50.17[1].

Bond for Punitive Damages Awarded Through Default Disallowed. In *Shapiro v. Clark* (2008) 164 Cal. App. 4th 1128, the court of appeal held that when a plaintiff was awarded punitive damages through a default judgment, but the trial court granted defendant relief from that default under Code Civ. Proc. § 473, the trial court abused its discretion in conditioning that relief on a requirement that defendant post a bond to secure the amount of punitive damages awarded through the default judgment. See Ch. 54, *Punitive Damages,* § 54.01.

Putative Spouse Doctrine Applied to Domestic Partnership. In *In re Domestic Partnership of Ellis & Arriaga* (2008) 162 Cal. App. 4th 1000, the court of appeal held that domestic partners who have failed to comply with the domestic partnership registration requirements, but who held a reasonable, good-faith belief that they had registered with the Secretary of State, are entitled under the putative spouse doctrine to the same rights granted to domestic partners who have properly registered. See Ch. 55, *Death and Survival Actions,* § 55.03[3][a].

Lack of Signal or Crossing Guard at Crosswalk Near School Not Dangerous Condition of Public Property. In *Cerna v. City of Oakland* (2008) 161 Cal. App. 4th 1340, the court of appeal held that the lack of a traffic signal or crossing guard at a crosswalk near which a school has opened does not constitute a dangerous condition of public property. The court also held that the imposition of liability under Educ. Code § 44808 for failure to exercise "reasonable care under the circumstances" applies only when a school district has made a specific undertaking as described by the statute, that is, only when the district has undertaken to provide transportation to or from the school, undertaken an off-premises activity, or otherwise specifically undertaken responsibility for student safety. See *Ch. 61, Particular Liabilities and Immunities of Public Entities and Public Employees,* §§ 61.01[2][d], 61.62.

City Not Liable for Injury to Pedestrian at Bulb-Out Intersection. In *Sun v. City of Oakland* (2008) 166 Cal. App. 4th 1177, the court of appeal held that the installation of "bulb out" sidewalk exten-

sions did not make an intersection a dangerous condition of public property, even when preexisting crosswalk markings were removed in the process. The court also held that a city's failure to comply with the public notice requirements of Veh. Code § 21950.5 prior to removing crosswalk markings did not render the city liable for an injury to a pedestrian caused by a motorist who failed to yield the right of way. See Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees,* § 61.03[4].

Prisoner Allowed to Proceed Against Jailers for Negligent Failure to Protect, But Not for State Constitutional Violation. In *Giraldo v. Department of Corrections & Rehabilitation* (2008) 168 Cal. App. 4th 231, the court of appeal held that there is no private right of action for violation of the prohibition against cruel and unusual punishment contained in Section 17 of Article I of the California Constitution. However, the court also held that because a prisoner is dependent and vulnerable, there is a special relationship between a jailer and a prisoner such that the jailer owes a common-law duty of care to the prisoner to take steps to protect the prisoner from foreseeable harm. See Ch. 1, *Negligence: Duty and Breach,* § 1.12[10], and Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees,* § 61.66A.

Statutory Government Claims Procedures Not Applicable When Contractual Claims Procedures are Provided. In *Arntz Builders v. City of Berkeley* (2008) 166 Cal. App. 4th 276, the court of appeal held that, except as required by statute, a claim subject to contractual claims procedures written into a public contract is not subject to the statutory claims presentation requirements of Gov. Code §§ 905 and 910 et seq., unless such a requirement is written into the agreement. See Ch. 62, *Claims and Actions Against Public Entities and Employees,* § 62.05[3].

Security Agreement Must Specify Tort Claim as Collateral. In *Waltrip v. Kimberlin* (2008) 164 Cal. App. 4th 517, the court of appeal held that commercial security agreement does not create a security interest in the proceeds from a commercial tort claim unless the tort claim is in existence at the time the agreement is authenticated and the agreement specifically describes the tort claim as collateral, and an attorney's lien attached to a tort claim takes priority over a lien based on a security agreement that, prior to creation of the attorney's lien, failed to specifically include the tort claim as collateral. See Ch. 70, *The Attorney-Client Relationship,* § 70.11[3][d].

Constructive Notice Under Code Civ. Proc. § 340.1(b)(2) Requires Actual Notice of Relevant Facts; Principal May Be Liable for Acts of Ostensible Agent. In *Deutsch v. Masonic Homes of California, Inc.* (2008) 164 Cal. App. 4th 748, the court of appeal held that for purposes of applying the revival statute of limitations for child abuse actions against non-perpetrator defendants who had notice of abuse but failed to take protective measures, constructive notice cannot be based on what the defendant *should* have noticed, but did not, even if plaintiff argues that the conduct was so pervasive and obvious that a reasonably attentive person would have noticed. The court also held that a principal may be liable when the principal intentionally or through the lack of ordinary care causes a third person to believe another person is an agent even though that person is not actually employed by the principal. See Ch. 71, *Commencement, Prosecution, and Dismissal of Tort Actions,* § 71.02[3][j].

Knowledge of Agent With Duty to

Report May be Imputed to Principal Under Code Civ. Proc. § 340.1(b)(2). In *Santillan v. Roman Catholic Bishop of Fresno* (2008) 163 Cal. App. 4th 4, the court of appeal held that for purposes of applying the revival statute of limitations for child abuse actions against non-perpetrator defendants who had notice of abuse but failed to take protective measures, when establishing the requisite knowledge on the part of a principal, knowledge on the part of an agent may be imputed to the principal if the agent had a duty to report that information to the principal. See Ch. 71, *Commencement, Prosecution, and Dismissal of Tort Actions,* § 71.02[3][j].

Personal Jurisdiction Over Foreign Banks Permitted Based on Acts in California of Agents. In *Anglo Irish Bank Corp., PLC v. Superior Court* (2008) 165 Cal. App. 4th 969, the court of appeal held that the exercise of personal jurisdiction over banks located in Ireland and on the Isle of Man, and over a related trust company, was constitutionally permissible based on the activities of individuals who visited California to seek investors in an investment project in which all three entities were involved. See Ch. 71, *Commencement, Prosecution, and Dismissal of Tort Actions,* § 71.20[3][c][i].

Personal Jurisdiction Over Virginia University Denied When Student Athlete Recruited in California Was Injured in Virginia. In *Roman v. Liberty University, Inc.* (2008) 162 Cal. App. 4th 670, the court of appeal held that a California court could not exercise personal jurisdiction over a Virginia university for injuries sustained in Virginia by a California resident who had been recruited in California to play football for the university. See Ch. 71, *Commencement, Prosecution, and Dismissal of Tort Actions, i].*§ 71.20[3][c][i].

California Court May Dismiss Stayed California Action for Failure to Diligently Prosecute Out-of-State Action. In *Van Keulen v. Cathay Pacific Airways, Ltd.* (2008) 162 Cal. App. 4th 122, the court of appeal held that if a stay of a California action is granted in order to allow a California resident to pursue an action in a foreign forum, the trial court retains the discretionary authority to later dismiss the California action if the plaintiff fails to prosecute the foreign action in a reasonably diligent manner. See Ch. 71, *Commencement, Prosecution, and Dismissal of Tort Actions,* § 71.24[4].

Burden of Proof to Show Spoliation of Evidence Clarified. In *Williams v. Russ* (2008) 167 Cal. App. 4th 1215, the court of appeal held that if a party moves for discovery sanctions based on the spoliation of evidence, the burden of proving that the destruction of evidence did not prejudice the moving party's case or defense may be placed on the party responsible for the destruction of the evidence, but only if the moving party makes an initial, prima facie showing that the responding party in fact destroyed evidence that had a substantial probability of damaging the moving party's ability to establish an essential element of his claim or defense. See Ch. 72, *Discovery,* § 72.04.

Subrogated Insurer May Not be Bound by Discovery Responses Provided by Insured. In *Great American Ins. Cos. v. Gordon Trucking, Inc.* (2008) 165 Cal. App. 4th 445, the court of appeal held that although a subrogated insurer may, under appropriate circumstances, be bound by discovery responses provided by the insured, if the insured is asked by interrogatory for all facts of which the insured is aware to support some allegation that is not within the insured's personal knowledge, a plaintiff insurer will not be bound by the

insured's factual deficient answers if the other party seeks summary judgment against the insurer. See Ch. 72, *Discovery,* § 72.40[3].

Code Civ. Proc. § 998 Offer to Settle May Be Served With Complaint. In *Barba v. Perez* (2008) 166 Cal. App. 4th 444, the court of appeal held that because Code Civ. Proc. § 998 does not place a minimum amount of time that must elapse following commencement of suit before an offer to settle under that statute may be served, an offer may be found to be made in good faith even if served with the complaint. See Ch. 73, *Settlement and Release,* § 73.07[2].

Effect of Good-Faith Settlements on Code Civ. Proc. § 998 Offers Clarified. In *Guerrero v. Rodan Termite Control, Inc.* (2008) 163 Cal. App. 4th 1435, the court of appeal held that if a defendant makes an offer to settle under Code Civ. Proc. § 998 that is rejected by a plaintiff who subsequently prevails at trial against that defendant, offsets for good-faith settlements made with other defendants after that offer was rejected should not be considered when determining whether plaintiff obtained a more favorable judgment. Conversely, if a defendant's offer is rejected after plaintiff has settled with other defendants, determination of whether plaintiff obtained a more favorable judgment should take into consideration any offset for those settlements. See Ch. 73, *Settlement and Release,* § 73.07[4].

Code Civ. Proc. § 998 Offer Silent on Attorney Fees Does Not Bar Recovery of Fees. In *Chinn v. KMR Property Management* (2008) 166 Cal. App. 4th 175, the court of appeal held that while a Code Civ. Proc. § 998 offer may specifically provide for the payment or waiver of attorney fees and costs, an offer that is silent on the issue of attorney fees and costs does not bar the recovery of fees and costs by the prevailing party. The court also held that if a plaintiff makes a rejected settlement offer to multiple defendants, one of whom would be liable for indemnification of another, the amount of the indemnification obligation may be considered in any subsequent determination of whether plaintiff or the indemnitor defendant received a more favorable judgment. See Ch. 73, *Settlement and Release,* § 73.07[5][a], [6].

Negotiating Settlement With Opposing Party Despite Knowledge of Party's Representation Not Grounds for Nonenforecement of Resulting Settlement. In *Myerchin v. Family Benefits, Inc.* (2008) 162 Cal. App. 4th 1526, the court of appeal held that the mere fact that opposing counsel continued to negotiate a settlement directly with plaintiff after being informed that plaintiff had hired an attorney, in apparent violation of Rule 2-100 of the California Rules of Professional Conduct, was not sufficient reason to refuse to enforce a resulting settlement, at least absent evidence that plaintiff lacked the ability to make a reasoned decision about entering into the settlement. See Ch. 73, *Settlement and Release,* § 73.09[2][b].

Settlement Credit Applied After Offset for Damage Awards to Both Plaintiff and Nonsettling Defendant. In *Brawley v. J.C. Interiors, Inc.* (2008) 161 Cal. App. 4th 1126, the court of appeal held that, after a plaintiff's settlement with some defendants, when a nonsettling defendant countersued the plaintiff and both parties were found liable and awarded damages to each other for breach of contract, the proper procedure is for the court to offset the jury's damage awards against each other, just as if there had been no settlement, and then to apply the settlement credit toward any amount that the nonsettling defendant might still

owe. See Ch. 74, *Resolving Multiparty Tort Litigation,* § 74.21[1][a].

Indemnitor's Duty to Defend Indemnitee Not Contingent on Whether Indemnity is Owed. In *Crawford v. Weather Shield Mfg. Inc.* (2008) 44 Cal. 4th 541, the California Supreme Court held that unless an indemnity agreement provides otherwise, Civ. Code § 2778(4) effectively places in every indemnity contract a duty on the part of the indemnitor to assume the indemnitee's defense, if tendered, against all claims embraced by the indemnity agreement, and this duty arises immediately upon a proper tender of defense by the indemnitee and does not first require a determination of whether indemnity is actually owed. See Ch. 74, *Resolving Multiparty Tort Litigation,* § 74.46.

Insurance Law

Arbitrability of Uninsured Motorist Claim. In *Bouton v. USAA Casualty Ins. Co.* (2008) 43 Cal. 4th 1190, the California Supreme Court held that Ins. Code § 11580.2(f) requires arbitration of whether a default judgment obtained against the underinsured tortfeasor by the insured is binding on the insurer; but does not require arbitration of whether a claimant is an insured under a particular policy. See Ch. 81, *Types of Insurance Policies,* § 81.24[1],[2].

Appraisal under Ins. Code § 2071. In *Devonwood Condominium Owners Ass'n v. Farmers Ins. Exch.* (2008) 162 Cal. App. 4th 1498, the appellate court held that a judgment that is not in conformity with the appraisal award made pursuant to Insurance Code Section 2071, on which it is based, violates Code of Civil Procedure Section 1287.4. See Ch. 82, *Claims and Disputes Under Insurance Policies,* § 82.43[5][b].

Professional Liability Policies. In *Westrec Marina Management, Inc. v. Arrowood Indemnity Co.* (2008) 163 Cal. App. 4th 1387, the appellate court held that a letter sent to the insured company from the third party's attorney stating that his client had been subjected to employment discrimination and suggesting that the insured resolve or mediate the matter, was a claim under the D&O policy; and that the insured failed timely to report the claim by failing promptly to notify the insurer of the letter. See Ch. 81, *Types of Insurance Policies,* § 81.05[3][b].

Workers' Compensation Law

Civil Actions; Hirer's Negligent Exercise of Retained Control. The court of appeal in *Millard v. Biosources, Inc.* (2007) 156 Cal. App. 4th 1338, has held that a general contractor was not liable to an injured employee of a subcontractor, when, following *Hooker v. Department of Transportation*, even if it could be shown that the general contractor retained control over the safety conditions at the worksite, there was no triable issue of fact that the general contractor affirmatively contributed to the subcontractor's employee's injuries. See *Ch. 10,* § 10.21[2].

Psychiatric Injuries; Actual Events of Employment. The court of appeal in *Verga v. W.C.A.B.* (2008) 159 Cal. App. 4th 174, has held that an employee did not suffer psychiatric injury AOE/COE as a result of actual events of employment that were predominant as to all causes combined, when the court found that substantial evidence supported the Board's factual findings that the employee's supervisor and co-workers did not persecute or harass her and that it was the employee who caused a stressful work environment by being rude, inflexible, easily upset, and demeaning toward other employees. See *Ch. 10,* § 10.03[2][b].

Injury AOE/COE; Bunkhouse Rule. The court of appeal in *Vaught v. State of California/Department of Parks and Recreation* (2007) 157 Cal. App. 4th 1538, has held that the exclusive remedy rule of Labor Code Section 3602(a) barred an employee and his wife's civil action against the husband's employer for negligence and failure to make a house habitable for human occupation, when the court found that the plaintiffs lived in the ranch house owned by the employer as an "employment benefit" of the husband's job as a park ranger, and that the husband was injured when, attempting to get up from the bathroom floor of the house, where he had been observing leaking pipes while "on all fours," he slipped and fell. See *Ch. 10,* § 10.03[3][e].

Injury AOE/COE; Off-Duty Athletic Activities. The court of appeal in *Tomlin v. W.C.A.B.* (2008) 162 Cal. App. 4th 1423, has held that a police officer's physical training injury, even though occurring while he was on vacation, was a compensable injury because his training was, pursuant to Labor Code Section 3600(a)(9), "a reasonable expectancy of . . . the employment." See *Ch. 10,* § 10.03[3][g].

Employment Relationships; Newspaper Carriers. The court of appeal in *Antelope Valley Press v. Steve Poizner as Insurance Commissioner* (2008) 162 Cal. App. 4th 839, has held that the administrative record supported the conclusion that newspaper carriers were employees for purposes of the workers' compensation law, not independent contractors. See *Ch. 10,* § 10.02[2][e][ii].

Employment Relationships; Independent Contractors. The court of appeal in *Chin v. Namvar* (2008) 166 Cal. App. 4th 994, has held that Labor Code Section 2750.5, which creates a rebuttable presumption that an unlicensed person who performs work requiring a license is an employee, not an independent contractor, was irrelevant because the statute's presumption of employee status may be rebutted only as to persons who hold a valid contractor's license, which plaintiff did not at the time of his injury. See *Ch. 10,* § 10.02[2][e][ii].

Third Party Actions; Hirer's Liability; Retained Control. The court of appeal in *McCarty v. State of California/Department of Transportation* (2008) 164 Cal. App. 4th 955, has held that Government Code Section 815.4 provided a statutory basis for a public entity potentially to be held liable on a retained control theory under *Hooker* and its progeny. See *Ch. 10,* § 10.21[2].

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